No. 83-1216

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM E. JONES and GLADYS A. JONES, husband and wife, and ACME MEAT COMPANY, INC., an Arizona corporation,

PETITIONERS,

v.

PRESCOTT A. BERRY, District Director, Internal Revenue Service; DAVID C. ARNELL, Chief, Criminal Investigation Division, Internal Revenue Service; BERNICE YOST, Group Manager, Criminal Investigation Division, Internal Revenue Service; JOHN M. MANNING, Special Agent, Criminal Investigation Division, Internal Revenue Service; JAMES E. MASON, Special Agent, Criminal Investigation Division, Internal Revenue Service; JOHN DOE I-X, inclusive; and JANE DOE I-X, inclusive,

RESPONDENTS.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Stephen E. Silver,
Counsel of Record
Bryan F. Murphy
BURCH & CRACCHIOLO, P.A.
P.O. Box 13528
Phoenix, Arizona 85002
602-252-7701
Attorneys for Petitioners

No.

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PETITIONERS,

v.

PRESCOTT A. BERRY, District Director, Internal Revenue Service; DAVID C. ARNELL, Chief, Criminal Investigation Division, Internal Revenue Service; BERNICE YOST, Group Manager, Criminal Investigation Division, Internal Revenue Service; JOHN M. MANNING, Special Agent, Criminal Investigation Division, Internal Revenue Service; JAMES E. MASON, Special Agent, Criminal Investigation Division, Internal Revenue Service; JOHN DOE I-X, inclusive; and JANE DOE I-X, inclusive,

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P.O. Box 13528
Phoenix, Arizona 85002
602-252-7701
Attorneys for Petitioners

APPENDIX A

OPINION AND ORDER

OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

WILLIAM E. JONES and GLADYS A. JONES and ACME MEAT COMPANY, INC., Petitioners, v. PRESCOTT A. BERRY, et al., Respondents.	FILED October 20, 1981 W. J. Furstenau, Clerk, U.S. District Court For the District Of Arizona NO. CIV 81-581 PHX VAC OPINION AND ORDER

INTRODUCTION

Petitioners were targets of an undercover operation conducted by the Internal Revenue Service (IRS). Prior to the institution of any criminal proceeding, petitioners filed a petition seeking the return and future suppression of certain evidence seized by the IRS agents. For the reasons hereinafter stated, the Court will grant the relief requested in the petition.

FACTS

In May of 1977 respondent John M. Manning, a Special Agent with the IRS, submitted a request for approval of the Business Opportunities Project (BOP). The objective of the BOP is to discover tax fraud by the use of IRS Special Agents acting in an undercover capacity as prospective purchasers of businesses for sale. The Agents would attempt to gain the confidence of the seller in order to elicit evidence of "skimming", the understatement of income, by the seller.

The BOP was approved by the District Director and went into effect as a local District project on June 2, 1977. Respondent David C. Arnell, Phoenix District Chief of the Criminal Investigation Division, then submitted a request for national approval of the program, which was initially denied on January 21,

1978 by the National Director of the Intelligence Division (now the Criminal Investigation Division). After the project was reclassified as a "quasi, non-penetration undercover approach" rather than as a deep penetration undercover technique which requires national approval, the National Director authorized the BOP on January 23, 1981. (Exhibit 18).

On January 10, 1981 Special Agent Manning visited Business World Investments, Inc. and represented to sales representative Frank Bornstein that he and a partner were interested in purchasing a business in the Phoenix area. Manning stated that he was originally from Springfield, Massachusetts and presented the business card of "J. Manning and Assoc." (Exhibit 1). Although the term "skimming" may not have been used at this initial meeting,

Manning indicated by veiled suggestions and hand gestures that he was interested in businesses with a substantial cash flow susceptible to skimming. Without mentioning the name of the company, and without discussing whether skimming was actually occurring, Bornstein responded that he had previously listed a meat company which might suit Manning's purposes.

After lining up a single party listing for petitioner Acme Meat Company in favor of Manning, Bornstein met again with Manning on February 7, 1981 and disclosed that the meat business was named Acme Meat Company. Manning signed a confidentiality agreement promising not to divulge information about Acme Meat to others, except to secure their advice and counsel. (Exhibit 2). Manning then scanned the corporate tax returns for Acme Meat for the fiscal years 1976, 1977

and 1978 which were given to him by Bornstein.

Bornstein and Manning then went to the premises of Acme Meat where Manning toured the business and met petitioner William E. Jones. Manning raised the subject of skimming to Jones while they were temporarily outside the presence of Bornstein. Though the conversation was conducted in somewhat vague terms, Manning testified that it was his impression, as a result of an "informal meeting of the minds," that Jones was skimming.

On February 18, 1981 Bornstein contacted Manning by telephone and asked: "Are you sure you are not from the IRS?" Manning testified that he just laughed, said nothing, and proceeded to arrange for another meeting with Jones.

On the morning of April 4, 1981 Manning met with Bornstein, William Jones

and his wife, Gladys, who is also a petitioner in this case, at the Joneses' Pinchot residence. Manning reviewed various corporate books and records, including sales invoices and the cash receipts and disbursements ledger for the fiscal year 1981, certain fiscal year 1980 business records, as well as the general corporate ledger.

Manning arranged to have his supposed business partner, Special Agent James E. Mason, a respondent herein, meet the Joneses to further consider the purchase of the business. Manning and Mason decided that Manning would feign interest in buying the business, while Mason would be reluctant and take a "show me" attitude. Manning and Mason toured the premises of Acme Meat with Mr. Jones on April 25, 1981. At the insistence of Manning, Bornstein did not attend this meeting. With the admitted intent of

viewing petitioners' records the agents again stated that they were only interested in purchasing a business that could generate substantial skimming and Mr. Jones then agreed to show them the records of the skim which were located at his home.

Upon arriving at the Joneses' Pinchot residence the agents noted a sign that the home was for sale. The agents asked for and were granted a tour of the house by Mr. and Mrs. Jones on the pretext that Mason knew someone who might be interested in purchasing it. Manning testified that in fact a purpose of the tour was to allow them to prepare a diagram of the house in order to obtain a search warrant.

The agents and the Joneses then went into the kitchen where certain books and records were on display. In response to Mason's request for proof of skimming,

Mrs. Jones removed a five by six inch paper from a file cabinet in the kitchen. Mason expressed doubt as to the validity of the monthly and yearly totals on the paper and asked for documentation to substantiate the figures, selecting at random the month of February, 1977 for a sample audit. The Joneses lead the agents to their bedroom where Mrs. Jones removed the February, 1977 skimmed invoices from the top left drawer of their dresser. After returning to the kitchen, Mrs. Jones reconciled precisely the figure entered on the summary sheet by adding the invoice totals on a calculator. Mason then assisted Mrs. Jones in returning one of the corporate ledgers to another bedroom where Mason noted the location of other books and records.

Within a few days after this April 25, 1981 meeting Manning drew a diagram of the Pinchot residence and prepared a

search warrant affidavit. A raid plan for the search was prepared by Special Agent David McCluskey. On the morning of May 1, 1981 a search warrant was issued by a United States Magistrate. (Exhibit 6). The agents assigned to execute the search met at the IRS offices where a copy of the search warrant was briefly circulated among the agents. The search warrant listed five specific items to be seized, and Manning instructed the agents as to the location of each item by means of the diagram included in the raid plan.

The search began at approximately 11:40 a.m. on May 1, 1981 when Special Agents McCluskey and Laura Brown announced to Mrs. Jones that they were real estate agents interested in viewing the premises. They followed Mrs. Jones into the kitchen where the agents displayed their badges and announced that they were there to execute a search

warrant, which may have been shown to Mrs. Jones at this time. Mrs. Jones was read her constitutional rights and declined the opportunity to telephone her husband or an attorney. Mrs. Jones was asked for consent to search the storage buildings behind the house and she responded that the records had been moved from the storage buildings to the Joneses' new residence on Rowland Lane. Mrs. Jones then read and signed consent forms to allow the search of the storage buildings at the Rowland Lane residence. Agent Brown remained with Mrs. Jones in the living room watching television during the search.

The search of the Pinchot residence was executed by approximately nine agents by means of a "search and finder" system. Agents were assigned to search a specific area and raid leader McCluskey was to review items brought to him by the other

agents to determine whether they were subject to seizure. McCluskey testified that his review of the items presented during the hour and ten minute search was cursory and he admitted that many items were improperly seized. It appears that with one exception[1] every item presented to McCluskey was tagged and seized. Approximately eight boxes of records were seized at the Pinchot residence. Mrs. Jones was presented with a copy of the search warrant which included an inventory summary of the items taken. Agents McCluskey and Brown then proceeded to the Rowland Lane residence where an additional eight boxes of records were seized.

At approximately 4:30 p.m. on May 1, Mr. Jones telephoned respondent Bernice Yost, Group Manager of the Criminal

1/ The agent refused to seize wrapped wedding gifts.

Investigation Division, and demanded the return of all of the records and stated they were needed for the operation of the business. Ms. Yost replied that certain items would be returned and on May 4 an adding machine and a blank checkbook were returned to the Joneses.

On May 6 the Joneses' attorney presented to Ms. Yost a written request for the return of all records. Ms. Yost did not fully comply with this request, however, and on May 7 merely returned blank business forms, an address book, a file cabinet, and various fiscal year 1981 records. (Exhibits 11, 12). The IRS has retained possession of the bulk of the seized records (Exhibits 15a, 15b, 15c) and has microfilmed many of the documents.

Petitioners filed a petition and an amended petition on May 27, 1981 seeking the return and suppression of the seized

records, and requesting a temporary restraining order preventing respondents from proceeding with their investigation of petitioners stemming from evidence obtaining as a result of the searches and seizures on April 4, April 25 and May 1, 1981. The Court issued a temporary restraining order on June 10, 1981. Respondents filed a motion to dismiss which was denied by the Court on June 25 following oral argument. An evidentiary hearing was held on July 10 and July 14, 1981.

DISCUSSION

In ruling on the motion to dismiss the Court determined that it had jurisdiction under Rule 41(e)[2] of the Federal

2/ Rule 41(e) provides:

> Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property

Rules of Criminal Procedure and on the basis of its inherent equity powers. See G. M. Leasing Corp. v. United States, 429 U.S. 338, 360, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977). At the time of the evidentiary hearing the respondents conceded and the Court finds that petitioners have shown sufficient irreparable injury to support such jurisdiction in this matter. See id: Hunsucker v. Phinney, 497 F.2d 29, 34 (5th Cir. 1974), cert. denied, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975).

Footnote 2 (cont'd)

> was seized for the return of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Petitioners raise several arguments in support of their Rule 41(e) request for the return and suppression of the seized records. They contend that the April 4 and April 25 meetings with the agents constituted illegal warrantless searches. They then argue that the May 1 search and seizure at the Pinchot residence was invalid under the fruit of the poisonous tree doctrine. This latter argument is that the search warrant was tainted by the affidavit which contained facts learned as a result of the prior unconstitutional searches.

Petitioners also maintain that all of the Pinchot evidence should be suppressed and returned on the ground that the search warrant was executed in an unreasonable manner and because the agents failed to comply with IRS internal procedures. Alternatively, they contend that at the very minimum those Pinchot records

not described in the search warrant should be returned and suppressed. With respect to the Rowland Lane documents, petitioners suggest that the consent was involuntary and was tainted by the illegal Pinchot search and seizure. In the alternative they assert that the consent was revoked and thus they are entitled to the suppression and return of the original records and those copies made after the consent was revoked.

Respondents oppose each of these arguments and request that the Court vacate the temporary restraining order and dismiss the amended peition.

Business Opportunities Project

This case presents novel issues concerning the use of undercover activities by the IRS. It appears that this is the first suit challenging the propriety of the BOP. As noted above the BOP involves IRS agents posing as prospective

purchasers of business. By presenting themselves as interested buyers the agents attempt to obtain incriminating evidence by appealing to the seller's natural inclination to reveal skimming. A seller may be inclined to disclose to a buyer that he is skimming in order to present a more positive picture of the income of the business than is actually reflected on the records of the company.

Here the agents attempted to augment this tendency to reveal skimming by adopting a "good guy--bad guy" approach. Agent Manning was the "good guy" who would appear to be anxious to close the deal, while his "partner" agent Mason would be hesitant and insist on further documentation of the skim. This approach has the effect of encouraging the sellers to think that one of the partners is on their side and thus they will receive their asking price if only they can

convince the "bad guy" of the true amount of the skim. Under these circumstances the sellers are more likely to produce the best available documentation of the skim, documentation that also will be the most damaging evidence in a later prosecution for tax fraud.

The reasonableness of warrantless searches during undercover operations turns on the particular circumstances of each case. Lewis v. United States, 385 U.S. 206, 208, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966). In this case the agents engaged in tactics which were specifically designed to induce petitioners to consent to a review of the skimming records. Moreover, when asked by the broker Bornstein whether he was with the IRS, Manning just laughed and said nothing. Yet not only is Manning an agent with the Criminal Investigation Division of the IRS, but it is clear that

the IRS approached this as a criminal investigation, at least from the moment during the initial February 7 meeting when Manning first understood that Mr. Jones was skimming.

The court in United States v. Tweel, 550 F.2d 297, 299 (5th Cir. 1977), set forth the standard which is applicable to the April 4 and April 25 consent searches: "It is a well established rule that a consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation of the Internal Revenue agent." This Court believes that the conclusion in Tweel is equally appropriate in this case: "From the facts we find that the agent's failure to apprise the appellant of the obvious criminal nature of the investigation was a sneaky deliberate deception by the agent under

the above standard and a flagrant disregard for appellant's rights. The silent misrepresentation was both intentionally misleading and material." Id. Indeed, the facts of this case present an even more egregious intrusion on the rights of petitioners since they did not know Manning and Mason were associated with the IRS, whereas the appellant in Tweel was at least aware that he was dealing with agents he thought were engaging in a routine civil audit. Even agent Mason himself during his deposition evidenced concern for the propriety of the BOP: "There has always been a question in my mind as to how far you can go before you would give a person his Miranda warning. I have always had a problem with conducting a criminal investigation under the guise of something else. I feel that is a violation of a person's rights."

(Deposition of James Mason, p. 48, lines 10-15).

Respondents advance two primary theories to justify the BOP against the Fourth Amendment challenge in this case. First, they contend that the April 4 and April 25 meetings were not searches since the agents were mere "receivers of information." It is clear that the activities of Manning on April 4 and the actions of Manning and Mason on April 25 were searches within the meaning of the Fourth Amendment. As the Court observed in Haerr v. United States, 240 F.2d 533, 535 (5th Cir. 1957): "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest." See United States v. Raub, 637 F.2d 1205, 1207-08 (9th Cir. 1980).

Respondents next assert that if the meetings were searches, then they were "reasonable" searches similar to those upheld in cases involving undercover activities. This Court concludes that the attempted analogy to cases involving ongoing criminal activity falls far short of the mark. Simply stated, respondents have not cited any case which convinces the Court that the IRS is identical, or even substantially similar, to the FBI for purposes of analyzing the effect of undercover operations on Fourth Amendment rights. Most of the cited cases involve the possession or transfer of contraband, where there is a manifest public interest in preventing continuing crime and seizing items which pose a risk to the health and safety of society. See, e.g., United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); United States v. Guidry, 534 F.2d 1220

(6th Cir. 1976). In that context, the suspect has no legitimate business or property interest in retaining possession or engaging in the transaction.

None of respondents' cases are analogous to the present circumstances in which the undercover operations are designed to secure evidence of a prior tax violation. Although the Court recognizes the importance of enforcing the tax laws, it cannot be said that noncompliance by a given taxpayer presents a threat to the general health and welfare of the public. In addition, it has been noted that society does have an interest in the propriety of police tactics regardless of the gravity of the offense being investigated. United States v. Penn, 647 F.2d 876, 886 (9th Cir. 1980) (Goodwin, J., dissenting). Furthermore, a taxpayer, whether complying or noncomplying,

has a legitimate interest in marketing his business.

While the Court of course recognizes the "necessity of undercover work" and "the value it often is to effective law enforcement," Weatherford v. Bursey, 429 U.S. 545, 557, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), it also appears to the Court that the unique nature and function of the IRS bears upon the question of the necessity for or value of undercover activities by IRS agents. Specifically, the value and necessity of the BOP is minimized to the extent that the continued operation of the project would interfere with the IRS' reliance on voluntary assessment and compliance by taxpayers. As the court noted in Tweel: "Our revenue system is based upon the good faith of the taxpayers and the taxpayers should be able to expect the same from the government in

its enforcement and collection activities." Tweel, supra, 550 F.2d at 300.

The Court concludes that the orchestrated ruse employed by the respondents on April 4 and April 25 constitutes a search in violation of petitioners' Fourth Amendment rights. Under the fruit of the poisonous tree doctrine, information obtained as a result of an illegal search cannot be used to support a search warrant. Alderman v. United States, 394 U.S. 165, 177, 89 S.Ct. 961, 22 L.Ed.2d 176, (1969); see Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). It is the respondents' burden to show that the search warrant is not tainted by the previous illegal searches. See Dunaway v. New York, 442 U.S. 200, 218, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939). Respondents have

not met this burden. Accordingly, the Court concludes that the search warrant as well as the Pinchot search and seizure of May 1 are the direct products of the prior illegal searches on April 4 and April 25 and thus all the property seized pursuant to this warrant must be suppressed and returned to petitioners.

Pinchot Residence

Aside from the issue of the tainted search warrant, petitioners argue that all of the Pinchot records should be suppressed and returned on the grounds that the search and seizure was conducted in an unreasonable manner and went well beyond the scope of the warrant. In the alternative, petitioners assert that those items not described in the warrant were illegally seized and thus are subject to return and suppression. Respondents, on the other hand, insist that none of the Pinchot items were illegally

seized, or, alternatively, that only the undescribed items ought to be suppressed and returned.

Petitioners maintain that the manner of the search and seizure was unreasonable since the "agents literally emptied the Joneses' home of all paper records even though the search warrant listed only five specific items." (Post Trial Memorandum of Points and Authorities, p.3, July 14, 1981). While the Court certainly connot condone this type of overreaching by the IRS, it appears that suppression and return of all the evidence is not the proper remedy for such conduct. In addressing this contention, the Court notes the analysis in VonderAhe v. Howland, 508 F.2d 364 (9th Cir. 1974), where the majority of the court refused to suppress all of the seized evidence under a remarkably similar set of facts. Both here and in

VonderAhe the most unreasonable aspect of the conduct of the IRS agents is the fact that they proceeded "to asport practically every piece of paper they could lay their hands on." Id at 365.

The Court is also unable to accept the position at the other extreme taken by the respondents -- that none of the Pinchot records should be suppressed or returned because of the method in which the search and seizure was executed. The search warrant here is extremely specific in describing the five items to be siezed,[3] yet virtually every item conceivably related to petitioners' financial affairs, as well as some unrelated items, was loaded into the IRS van. (Exhibits 12, 15). Respondents acknowledge

3/ The warrant provided for the seizure of the following items:

1. Packages of sales invoices folded in half for the period December 23, 1975 to the present.

that it is their burden to justify the seizure of the undescribed items by demonstrating a nexus between those items and the crime being investigated. Warden v. Hayden, 387 U.S. 294, 307, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); see Andresen v. Maryland, 427 U.S. 463, 483-84, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). Respondents have failed to meet this

(Footnote 3 cont'd)

2. Manila envelopes containing corporate cash receipts/case disbursements and general ledger sheets for the fiscal years ending November 30, 1976, 1977, 1978, 1979 and 1980.

3. Cash receipts/case disbursements book (dark, bound, 8 1/2" x 14"), a general journal (dark, bound, 9" x 12"), both for the fiscal year 1981.

4. Black and white cardboard container (12"x10"x4") containing current duplicated bank deposit information, with customer identifying information, and current (1981) folded sales invoices.

5. A 5" x 6" sheet of paper containing summary listing skimmed receipts of Acme Meat Company, Inc. for the years 1975 through December 1980, inclusive, located in a two-drawer filing cabinet.

burden, however, as there simply has been no adequate showing that any of the items beyond those enumerated in the warrant are relevant to a skimming case. Indeed, the fact that respondents did not find it necessary to retain as potential evidence the vast quantity of items voluntarily returned to petitioners on May 4 and May 7 suggests to the Court that respondents in effect have conceded that there is no nexus between those materials and a skimming charge.

If the Court had not already concluded that all of the Pinchot records should be returned and suppressed because of the illegal searches and the tainted warrant, the Court would be constrained to find that the intermediate position adopted by both parties -- that only the undescribed items seized from the Pinchot residence should be returned and suppressed as a result of the manner in

which the search and seizure was conducted -- is supported under the law and the facts of this case. Authority for this approach in this circuit is also found in United States v. Daniels, 549 F.2d 665, 668 (9th Cir. 1977), where the court noted: "The exclusionary rule does not require the suppression of otherwise legal seizures merely because they were part of the same search in which an illegal seizure occurred." See also, United States v. Hubbard, 493 F.Supp. 209, 222 (D.D.C. 1979) and cases cited therein. As discussed above, the seizure of the Pinchot records is not "otherwise legal" since the seizure was based upon a tainted warrant.

Rowland Land Residence

During the course of the Pinchot search and seizure on May 1, 1981, the agents obtained the consent of Mrs. Jones to allow the agents to search the

Joneses' new home on Rowland Lane, to which they were in the process of moving. Later that afternoon two agents went to the Rowland Lane residence and seized approximately eight boxes of records. Testimony at the hearing revealed that Mr. Jones telephoned respondent Yost around 4:30 p.m. on the day of the search and demanded the return of all seized records. A written demand for the return of the records was presented to Ms. Yost by the Joneses' attorney on May 6.

Petitioners raise several arguments in seeking the suppression and return of the Rowland Lane documents. First, they assert that the consent to the search was not voluntary since Mrs. Jones in effect was in custody by the agents when she consented to the search. While the facts do not suggest that Mrs. Jones was in custody, consent to a search may be voluntary, even though it is given by a

person in police custody. United States v. Perez, 644 F.2d 1299, 1302 (9th Cir. 1981). In any event, under the present circumstances respondents have met their burden of proving that the consent was given voluntarily. Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

Petitioners direct the Court's attention to United States v. Taheri, 648 F.2d 598 (9th Cir. 1981), where the court stated: "Even assuming that the consent was voluntary, however, the evidence found as a result of that consent must nonetheless be suppressed if the unconstitutional conduct was not sufficiently attenuated from the subsequent seizure to void exclusion of the evidence." Id. at 601 (citation omitted). Respondents bear the burden of proving admissibility by showing that Mrs. Jones' consent was "sufficiently an act of free will to

purge the primary taint of the unlawful invasion." United States v. Perez-Esparza, 609 F.2d 1284, 1289 (9th Cir. 1979), quoting Wong Sun v. United States, 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); see Taheri, supra, 648 F.2d at 601. The Court concludes that respondents have not shown sufficient attenuation of the taint of the unlawful conduct in this case.

Mrs. Jones' consent was obtained on May 1 during the course of an illegal search of the Pinchot residence. Under these circumstances it is clear that there is a "close causal connection" between the unlawful conduct and the consent, Dunaway v. New York, supra, 442 U.S. at 218, and it is beyond question that the illegal activity tended to significantly direct the investigation toward obtaining the consent to seize the evidence in question. United States v.

Patino, 649 F.2d 724, 729 (9th Cir. 1981); United States v. Chamberlin, 644 F.2d 1262, 1926 (9th Cir. 1980). Thus the consent was tainted. Moreover, respondents cannot point to the lapse of time or an intervening event that would serve to dissipate the taint. See Taheri, supra, 648 F.2d at 601. This is not a case in which the decision to consent was "completely self-motivated" or was unforseeable by the agents, where excluding the evidence from the ensuing search would serve no deterrent purpose. Perez-Exparza, supra, 609 F.2d at 1289; see Brown v. Illinois, 422 U.S. 590, 610, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J. concurring in part). It appears to the Court that respondents should not be permitted to exploit the illegality of their presence in the Joneses' home by exercising the opportunity to secure the consent of Mrs.

Jones for the Rowland Lane search. See Wong Sun v. United States, supra, 371 U.S. at 488. Therefore, consistent with the deterrence and judicial integrity purposes of the exclusionary rule, the Court will order the suppression and return of all the items taken from the Rowland Lane residence. See Dunaway v. New York, supra, 442 U.S. at 218; United States v. Perez-Esparza, supra, 609 F.2d at 1288-91

Petitioners also argue that they are entitled to the return and suppression of the Rowland Lane items on the separate ground that the consent to the search was revoked by the demands for their return. The Ninth Circuit has held that where a taxpayer consents to a taking of business records but later demands their return, the IRS must return the records and all copies made subsequent to the withdrawal of consent. United States v. Ward, 576

F.2d 243 (9th Cir. 1978); see Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977). This holding is directly applicable to the instant case. Accordingly, on this basis petitioners would be entitled to the suppression and return of all the original items taken from the Rowland Lane residence and those copies made subsequent to the withdrawal of consent at approximately 4:30 p.m. on May 1, 1981.

In their final post-trial brief petitioners raised an additional argument that the evidence should be suppressed because the agents failed to comply with guidelines for the BOP suggested by the National Director in his approval of January 23, 1981. See United States v. Caceres, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979); United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975). In light of the Court's disposition in

this case, the Court will decline to pass upon this issue.

CONCLUSION

The Court concludes that the BOP has operated to violate petitioners' Fourth Amendment rights in that illegal warrantless searches were conducted on April 4, and April 25, 1981. Thus, the May 1 Pinchot search and seizure is rendered invalid since it was based upon a warrant tainted by these prior illegal searches. Consequently, petitioners are entitled to the suppression and return of all the Pinchot items on that basis. If the Court had not so concluded, petitioners would be entitled to the return and suppression of those Pinchot records not within the scope of the warrant on the separate ground that the search and seizure was executed in an unreasonable manner.

The Court will order the return and suppression of all the Rowland Lane items since the consent to that search was tainted by the unlawful conduct of respondents. Even were that not so the revocation of the consent would independently require the suppression and return of the original Rowland Lane records as well as all copies made after the consent was withdrawn.

THEREFORE, IT IS ORDERED vacating the temporary restraining order of June 10, 1981 and now granting the petition to the following extent:

1. Respondents are ordered to return to petitioners all books, records, correspondence, documents and other items, and all copies thereof, as well as all extracts, including all evidence obtained directly therefrom, in possession of federal authorities, that were obtained contrary to law and as a result

of the unlawful searches and seizures in this case; and

2. Respondents are permanently restrained and enjoined from using in any criminal proceeding against petitioners any written documents or evidence, copies thereof, all notes, all memoranda, and other reproductions and summaries thereof, relating to tax matters of corporate petitioner for the fiscal years ending November 30, 1976 through November 30, 1980, inclusive, and individual petitioners for the calendar years ending December 31, 1976 through December 31, 1980, inclusive, obtained by respondents from petitioners.

DATED this 19th day of October, 1981.

/s/
Valdemar A. Cordova
U.S. District Court Judge

APPENDIX B

OPINION OF THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM E. JONES and GLADYS A. JONES, husband and wife, and ACME MEAT COMPANY, INC., an Arizona corporation, Petitioners, v. PRESCOTT A. BERRY, District Director, Internal Revenue Service; DAVID C. ARNELL, Chief, Criminal Investigation Division, Internal Revenue Service; BERNICE YOST, Group Manager, Criminal Investigation Division, Internal Revenue Service; JOHN M. MANNING, Special Agent, Criminal Investigation Division, Internal Revenue Service; JAMES E. MASON, Special Agent, Criminal Investigation Division, Internal Revenue Service; JOHN DOE I-X, inclusive; and JANE DOE I-X, inclusive, Respondents.	FILED October 24, 1983 Philip B. Winberry, Clerk, U.S. Court of Appeals No. 81-5922 D.C. No. CIV 81-581-PHX-V OPINION

Appeal from the United States District Court for the District of Arizona
Valdemar A. Cordova, District Judge, Presiding

APPENDIX B

Argued and Submitted:
October 13, 1982

BEFORE: SKOPIL and FLETCHER, Circuit Judges, and McNICHOLS,* District Judge.

FLETCHER, Circuit Judge:

The Internal Revenue Service (IRS) appeals from the district court's grant of appellee's pre-trial motion to suppress evidence. The IRS challenges the holding that appellees' fourth amendment rights were violated by IRS undercover agents who elicited incriminating information from them by false pretences. Our court's jurisdiction rests on 28 U.S.C. § 1291 (1976). We reverse and remand.

I

FACTS

In May of 1977, IRS Special Agent John Manning requested approval for an undercover operation designed to discover tax fraud by owners of businesses offered

* The Honorable Ray McNichols, United States District Judge for the District of Idaho, sitting by designation.

for sale. Manning proposed examining the tax returns of businesses that were for sale to determine the potential for skimming income[1] from the business. Where skimming appeared possible, special agents, posing as prospective purchasers of the business, would meet the business sellers, gain their confidence, and then attempt to obtain evidence of skimming for use in subsequent tax prosecutions. The project, known as the Business Opportunity Program (BOP), was approved by the Arizona District IRS Director in June of 1977 and by the National Director in January of 1981.[2]

Special Agent Manning initiated the BOP by checking newspaper advertisements of businesses for sale. On January 10, 1981, he visited the offices of a business broker, telling the broker that he and his partner were looking for businesses to purchase in the Phoenix area.

Though skimming was not openly discussed, Manning suggested subtly that he was particularly interested in businesses with a cash flow susceptible to skimming. The broker mentioned that he knew a company that might suit Manning's purpose. Whether skimming was actually occurring at the company was never discussed but the characteristics of the business that would make it susceptible to skimming were discussed.

On February 7, 1981, the broker identified to Manning the business he had in mind as Acme Meat Co. After Manning executed an agreement providing for confidentiality of all information he received about the company, the broker permitted him to examine Acme's corporate income tax returns for 1976, 1977 and 1978. After reviewing the tax returns, Manning and the broker visited the premises of Acme where they met William

Jones, the owner, and toured the business. Manning's discussion with Jones regarding skimming did not go beyond hints and suggestions, but Manning gained the impression that Jones was skimming. At the close of the February 7 meeting, Manning indicated he was interested in the business and would like to see the books and records.

At a second meeting arranged for April 4, Manning and the broker met Jones at his personal residence. Manning examined the cash receipts and disbursements ledger, invoices, certain other business records, and the general corporate ledger. Manning was not supplied any records that would constitute "documentable proof" of unreported income under the BOP guidelines. But Manning persisted seeking another meeting which took place on April 25, 1981.

Manning, accompanied by Special Agent Mason, met Jones at the Acme Meat Company factory. Mason blatantly suggested that he and Manning were interested in purchasing a business that could generate substantial skimming. They demanded to see records supporting Acme's purported skim. Jones led the agents to his home where Mrs. Jones produced records which substantiated the skim. The agents left, promising to contact the Joneses promptly about their decision.

On May 1, 1981, armed with a search warrant, several IRS agents went to the Jones home. Two of the agents approached Mrs. Jones in the front yard of her home. Noting the home was for sale, they announced that they were realtors interested in viewing the premises. Once inside, they informed Mrs. Jones that they were Internal Revenue Service special agents with a search warrant. A

thorough search of the house ensued. A second residence owned by the Joneses was also searched pursuant to Mrs. Jones' consent. During the search, IRS agents seized 16 boxes of papers, records and books. In addition to business records, the agents seized a file cabinet, an adding machine, rubber bands, pencils, stamps, paperclips and other office supplies, a popcorn popper warranty and a book on body building. Three thousand items were taken from the Jones' two residences.[3]

At least two requests were made for the return of all or part of the items seized. Finally, on May 27, 1981, the Joneses and Acme Meat Co. filed a motion under Rule 41(e) of the Federal Rules of Criminal Procedure seeking the return and suppression of the seized records. Following an evidentiary hearing, the district court granted the relief requested.

The district court found that although the undercover operation might have been valid if performed by a different law enforcement agency seeking evidence of a different kind of crime, it was an unreasonable search when done by the IRS and violated appellees' fourth amendment rights Jones v. Berry, 524 F.Supp. 645, (D. Ariz. 1981). Finding that the information for the search warrant had been obtained as a result of impermissible undercover activities, the court suppressed the evidence obtained by the IRS. Id. As to the items seized at the second house, the trial court held that, even absent a finding of a fourth amendment violation as to the search for and seizure of those items, the IRS should return all items seized at the second residence because the Joneses had effectively withdrawn their consent to

the search by requesting the return of the documents. Id. at 654.

II

DISCUSSION

A. The "Search" of Appellees' Home by the IRS.

The analytic framework for determining whether law enforcement activities constitute a search within the meaning of the fourth amendment is found in Katz v. United States, 389 U.S. 347 (1967), particularly in Justice Harlan's concurring opinion. In Katz, government agents eavesdropped on conversations in a telephone booth by means of an electronic iistening device attached to the top of the booth. Holding that "the Fourth Amendment protects people, not places," id. at 351, the Court discarded the trespass analysis applied in prior cases to determine whether a fourth amendment search occurred. Id. at 351-53. The court concluded that, despite the absence

of a physical intrusion into the telephone booth, the agents' actions "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." Id. at 353. As stated more explicitly by Justice Harlan, the court in Katz recognized two requirements for the existence of a privacy interest protected by the fourth amendment: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Id. at 361. (Harlan, J., concurring). Where both prongs of the test are met, law enforcement activity that intrudes upon the privacy interest is considered a search within the meaning of the fourth amendment. We turn to an application of

the Katz test to the facts of the case before us.[4]

The district court, after its review of the facts "conclude[d] that the orchestrated ruse employed by the [IRS agents] on April 4 and April 25 constitute[d] a search in violation of petitioners' Fourth Amendment rights." 524 F. Supp. at 652. In its view, undercover activities, while often necessary to effective law enforcement, should not be sanctioned when employed by the IRS because such operations "would interfere with the IRS' reliance on voluntary assessment and compliance by taxpayers." Id. Indeed, the court found that "the IRS is [not] identical, or even substantially similar, to the FBI for purposes of analyzing the effect of undercover operations on Fourth Amendment rights." While we agree with the district court that the BOP, even if implemented in

conformity with the National Director's requirements, may ultimately be destructive, we reluctantly disagree that such policy concerns can control our decision here. The district court's failure to apply the Katz test leaves essentially unsupported its conclusion that a fourth amendment search occurred in this case.[5]

When the Katz standard is applied to the facts presented by this case, we conclude that the IRS activities with respect to the Joneses and Acme Meats, however unwise and shortsighted they may have been, did not constitute a search within the meaning of the fourth amendment. The first part of the Katz test asks whether the Joneses exhibited by their conduct an intention to preserve as private the evidence of skimming obtained by the IRS agents. See Smith v. Maryland, 442 U.S. 735, 740 (1979). Pertinent to answering this question are the

decisions of the Supreme Court in Hoffa v. United States, 385 U.S. 293 (1966), and Lewis v. United States, 385 U.S. 206 (1966). In Hoffa, the Court stated that the fourth amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Id. at 302. In subsequent cases, courts have applied the "misplaced confidence" doctrine of Hoffa to undercover activities by agents of the Internal Revenue Service, see United States v. Scott, 521 F.2d 1188, 1191 (9th Cir. 1975); see also United States v. Irvine, 699 F.2d 43, 45-46 (1st Cir. 1983) (noting possible applicability of Hoffa), to investigations of past criminal activities, see United States v. Davanzo, 699 F.2d 1097, 1100 (11th Cir. 1983)(citing United States v. Lovasco, 431 U.S. 783 (1977)), and to confidences revealed to agents as

well as informers, see United States v. Schuster, 684 F.2d 744, 747-748 (11th Cir. 1982), rehearing granted, 697 F.2d 910 (1983); United States v. Scott, 521 F.2d at 1191. The chief remaining limitation on the "misplaced confidence" doctrine appears to be that the agent or informer may not search for evidence not voluntarily revealed by the unsuspecting criminal. Compare Lewis v. United States, 385 U.S. at 209-210, with Gouled v. United States, 255 U.S. 298, 205-206 (1921). See United States v. Schuster, 684 F.2d at 748-749 (scope of search must be limited to consent given). This limitation, however, is not applicable to appellees' case.[6] Accordingly, we believe that Hoffa and its progeny compel the conclusion that when, as here, undercover agents gain the confidence of one suspected of criminal activity, and the suspect later voluntarily reveals to the

agents evidence of crimes, he or she can have no expectation of privacy in the information so revealed. See United States v. White, 401 U.S. 745, 749 (1971)(plurality opinion). Government discovery of information or activities, as to which a defendant exhibits no expectation of privacy, is not a search within the meaning of the fourth amendment. See, e.g., Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring); United States v. Kramer, No. 82-2024, slip op. at 5-7 (7th Cir. July 5, 1983)(discussing policy search of trash containers).[7]

Our conclusion that there has been no fourth amendment violation in this case should not be misconstrued as approval of the tactics employed by the IRS agents. It is plain from the record that the IRS has violated its own policy on undercover operations. The agents involved admit

that neither of the National Director's express conditions for implementation of the BOP were met until long after the Jones investigation began.[8]

Democratic governments are based on a relationship of trust between government and the governed. If the possibility exists that the next acquaintance one makes may be a government agent conducting a hidden investigation unjustified by any indication of wrongdoing, every relationship will be tainted by suspicion and fear.

B. The "Consent Search" of Appellees' Second Residence.

When the IRS searched the Jones residence on May 1, it discovered that some of the documents named in the search warrant had been moved to a second house owned by the Joneses. The IRS agents sought and received permission from Gladys Jones to search the second residence for the items listed in the

warrant. On the same day, after the search of the second residence had been completed, William Jones telephoned the IRS stating that he was withdrawing the consent to search the second residence and wanted the IRS to return all documents seized there. The IRS refused.

In their motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, the Joneses requested the district court to suppress all evidence seized by the IRS at their second residence on alternate grounds. First, they argued that the search of the second residence was tainted by its close connection to the allegedly illegal search of the first residence, and second, they argued that the seizure of evidence from the second residence was conducted in the absence of effective consent. The district court agreed with both contentions

and ordered the suppression and return of any evidence discovered there.

Because the district court erred in its conclusion that the search of the first residence was illegal, suppression of evidence found at the second residence is not warranted on the ground that the search of the second residence was tained by the search of the ffrst. We must, therefore, determine whether the district court correctly concluded that the evidence seized at the second residence should be suppressed on the independent ground that the search of the second residence was conducted in the absence of effective consent. The district court relied on United States v. Ward, 576 F.2d 243 (9th Cir. 1978).

Ward held that a person may revoke a consent to search at any time prior to the completion of the search. The court remanded for an evidentiary hearing to

segregate the evidence gathered before from that gathered after the revocation of consent and did not foreclose the government from securing the material as to which the search has not been completed by other lawful means.

In this case, Mrs. Jones consented to a search of her second residence for certain records named in a search warrant. This search was carried out and the items named were discovered and seized before Williams Jones revoked the consent granted by his wife. Had the revocation of consent occurred before the IRS agents completed their search of the second residence for the documents named in the warrant, Ward would compel the conclusion that any further search of the residence for the documents subsequent to the revocation of consent would be illegal, but that is not the situation with which we are faced. The house was searched and

the documents seized before the consent was revoked.[9] Accordingly, the district court erred in ordering suppression of the evidence seized at the Joneses second residence on the basis of our decision in United States v. Ward.

III

CONCLUSION

Because the district court erred in finding that the IRS activities in this case violated the fourth amendment, and because it erred in concluding that the IRS had searched one of the Jones residences in the absence of effective consent, its judgment granting the appellees' motion to suppress and return evidence under Fed. R. Crim. P. 41(e) must be reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

FOOTNOTES

1/ "Skimming" income is the removal of a portion of gross income without entering it in financial records of a business' bookkeeping system. The skimmed income thus never shows up in the bookkeeping system and is not reported as income for tax purposes.

2/ The BOP was initially disapproved by the National Director. Eventually efforts to secure national approval met with success. Upon approval, the National Director warned the agents that "indiscriminate usage, absent sufficient basis, could potentially adversely reflect upon the service." Two express conditions were imposed:

> At the very least, before an agent contacts a business seller, we should have a reasonable basis to believe that the taxpayer offering the business for sale has understated the reported net profit of the business. Also, the [tax] returns of the business do not reflect a realistic picture of income when compared with the asking (selling) price. [sic]

3/ The district court correctly ruled that all items seized in excess of those named in the search warrant should be returned to the Joneses. See VonderAhe v. Howland, 508 F.2d 364, 368, 372 (9th Cir. 1974).

4/ We review the district court's conclusion that a violation of the fourth amendment occurred in this case under the de novo standard applicable to questions of law. See United States v. Bates, 533 F.2d 466, 468 (9th Cir. 1976).

5/ The district court relied principally on the Fifth Circuit's decision in United States v. Tweel, 550 F.2d 297, 299, (5th Cir. 1977), to conclude that a violation of the fourth amendment occurred in this case. Tweel, however, is distinguishable. There, IRS agents, known to the suspect to be IRS agents empowered to conduct civil audits, abused the voluntary civil tax reporting and investigation system by inducing the suspect to turn over records for a criminal investigation. Thus, they abused the powers of their positions. Here, by contrast, the IRS agents did not pretend to be civil agents, thereby implicitly invoking their powers as civil investigators, when in fact they intended to conduct a criminal investigation. Rather, the agents pretended to be fellow criminals in order to gain the Joneses' con fidence. Such deception is far different from that practiced in Tweel. The other cases relied upon by the Fifth Circuit in support of the rule of Tweel are subject to the same distinction, see United States v. Rothstein, 530 F2d 1275, 1278 (5th Cir. 1976); United States v. Dawson, 486 F.2d 1326, 1329 (5th Cir. 1983); United States v. Bland, 458 F.2d 1, 8 (5th Cir.), cert. denied, 409 U.S.

843 (1972); United States v. Tonahill, 430 F.2d 1042, 1044 (5th Cir.), cert. denied, 400 U.S. 943 (1970); United States v. Prudden, 424 F.2d 1021, 1033, (5th Cir.); cert. denied, 400 U.S. 831 (1970), as are the cases from this circuit, see United States v. Robson, 477 F.2d 13, 17 (9th Cir. 1973); Simon v. United States, 421 F.2d 667, 668 (9th Cir.), cert. denied, 398 U.S. 904 (1970); Spahr v. United States, 409 F.2d 1303, 1306 (9th Cir.), cert. denied, 396 U.S. 840 (1969).

6/ There is, for example, no argument that the agents in this case heard or saw anything that the Joneses did not intend them to hear or see. Lewis v. United States, 385 U.S. 206, 209-10 (1966).

7/ There is no allegation that the IRS undercover operations were in excess of statutory authority or conducted in violation of specific statutory or regulatory authority. While we agree with the policy considerations discussed in the district court opinion, we are unable, on the facts of this case, to agree that the district court's suppression order should be sustained by the exercise of our supervisory powers. See United States v. Caceres, 440 U.S. 741, 755-57 (1979); United States v. Irvine, 699 F.2d 43, 45-46 (1st Cir. 1983).

8/ The violations of policy by the IRS agents subject them to sanctions from within the agency. We assume the sanctions will be applied to prevent further abuses.

9/ No claim can be made that items seized in the course of a consent search, if found, must be returned when consent is revoked. Such a rule would lead to the implausible result that incriminating evidence seized in the course of a consent search could be retrieved by a revocation of consent.

APPENDIX C

ORDER OF THE NINTH CIRCUIT

DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM E. JONES and GLADYS A. JONES, husband and wife, and ACME MEAT COMPANY, INC., an Arizona corporation,	)
Petitioners,	)
v.	)
PRESCOTT A. BERRY, District Director, Internal Revenue Service; DAVID C. ARNELL, Chief, Criminal Investigation Division, Internal Revenue Service; BERNICE YOST, Group Manager, Criminal Investigation Division, Internal Revenue Service; JOHN M. MANNING, Special Agent, Criminal Investigation Division, Internal Revenue Service; JAMES E. MASON, Special Agent, Criminal Investigation Division, Internal Revenue Service; JOHN DOE I-X, inclusive; and JANE DOE I-X, inclusive,	) FILED December 20, 1983 Philip B. Winberry, Clerk, U.S. Court of Appeals) No. 81-5922) D.C. No. CIV 81-581-PHX-) ORDER
Respondents.	)

Before: SKOPIL and FLETCHER, Circuit Judges, and McNichols, District Judge.

APPENDIX C

The panel as constituted above has voted to deny the petition for rehearing; Judges Skopil and Fletcher have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.